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Charles M. Kneier
University of Illinois

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City-State Conflict in the Use of Municipal Police Power

By CHARLES M. KNEIER*

The applicability of municipal police regulations to the state has been an area of increasing conflict between state and local governments. It remains one of the unsolved problems in the field of intergovernmental relations; at least it has not been satisfactorily solved from the local government's point of view. Municipalities in which state property is located, whether it be the state capitol, a state penal or welfare institution, a state highway department garage, or a state office building, find it quite unreasonable that non-discriminatory municipal regulations, which do not actually interfere with the state in the performance of its functions, should not apply to state property. Immunity of the state from municipal police regulations—building codes and zoning ordinances, smoke abatement regulations, elevator and boiler inspection and other safety and health measures—irritates the local governments and seems to them to be carrying the sovereign immunity doctrine too far. Smoke pouring from a state-owned building which does not meet the requirements of a building code, and is a non-conforming use under a zoning ordinance, is no less distasteful or offensive to the people than it would be if it came from a privately owned building. As long as the courts are available to strike down municipal regulations which either discriminate against the state or interfere with the performance of a state function, does public policy justify or require state exemption from such regulations?

Since cities "are the creatures, mere political subdivisions, of the State for the purpose of exercising part of its powers,"¹ with the number, nature and duration of their powers resting "in the absolute discretion of the State,"² it follows that unless the power

* Professor of Political Science, University of Illinois. A.B., M.A., Ph.D., University of Illinois; J.D., University of Michigan.

¹ *Atkin v. Kansas*, 191 U.S. 207, 220 (1903).

² *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907).

is expressly granted, they may not apply their police regulations to the state. They do not have the power to limit, restrict or regulate the creator by police regulations.³ It is not a question of the reasonableness of municipal regulations, the view the cities feel should be followed, but of their applicability even though they are reasonable and constitute no burden.

I. APPLICATION OF THE IMMUNITY PRINCIPLE

A. *Contractors, Civil Service Employees and State Licensees*

Under the immunity principle, building codes and zoning ordinances are not applicable to state buildings. A contractor engaged in constructing a state building need not obtain a building permit nor pay a fee.⁴ The state is as exempt from "local laws as the King was of old in the exercise of his sovereign prerogatives as universal trustee for his people."⁵ While the state may waive this immunity, legislative intent to do so must be clearly expressed, and it "will not be presumed to have waived its right to regulate its own property by ceding to the city the right generally to pass ordinances of a police nature regulating property within its bounds."⁶

The fact that the city does not charge a fee for a building permit is immaterial. In *New Jersey Interstate Bridge & Tunnel Comm'n v. Jersey City*,⁷ the city was held to be without power to require a contractor to take out a building permit for the construction of the Hudson tubes even though the city was willing to waive the fee.

Cities may not apply their licensing power to the state in the performance of its functions. Where a state civil service employee was engaged in work as a plumber on state property, the municipality was denied the right to enforce its ordinance requiring every person performing labor as a journeyman plumber to procure a certificate of registration.⁸ The California Supreme Court held that the state need not "bow to the requirement of its

³ As stated by one court, "from the nature of things," a city may not have authority superior to the state over the latter's property, or over its control and management. *City of Fulton v. Sims*, 217 Mo.App. 677, 106 S.W. 1094 (1908).

⁴ *City of Atlanta v. State*, 181 Ga. 346, 182 S.E. 184 (1935).

⁵ *Milwaukee v. McGregor*, 140 Wis. 35, 121 N.W. 642 (1909).

⁶ *Kentucky Institution for the Blind v. Louisville*, 123 Ky. 767, 97 S.W. 402 (1906). See also *Davidson County v. Harmon*, 292 S.W.2d 777 (Tenn. 1956).

⁷ 93 N.J.Eq. 550, 118 Atl. 264 (1922).

⁸ *Ex parte Means*, 14 Cal.2d 254, 93 P.2d 105 (1939).

governmental subsidiary.”⁹ While the doctrine encompassed civil service employees, it could not be extended to include attorneys licensed by the state. In *Dreidel v. Louisville*,¹⁰ an attack was made on a local ordinance imposing a license tax on lawyers. The attorney claimed that all lawyers are now a part of the Judicial Department of the state, and for that reason the city is without power to tax them. The Kentucky Court of Appeals rejected this contention on the ground that “members of the Bar are not members of the State Judicial Department, in the full sense of that expression.”¹¹ A similar contention that a Philadelphia ordinance licensing attorneys was “an invalid interference with their activities as officers of the courts” was rejected on the ground that it would be an “unrealistic pronouncement” to follow the old doctrine that “the power to tax involves the power to destroy.”¹²

Immunity from municipal regulation has been granted to a contractor engaged in construction work for the state since the state “is the actor in carrying the particular purpose into execution.”¹³ The immunity principle, however, was not extended to a lessee of state lands drilling for oil where the state was to receive one-eighth of the oil as royalty. Requiring a license, including the payment of a fee of \$1000, to drill an oil well in the city by the lessee on land owned by the state was held “not a direct burden upon the state” and to “not affect its interest in any way.”¹⁴ But where the court found that the state had occupied the field of control and leasing of state-owned property for drilling oil, the city was denied the right to prohibit drilling within its territorial boundaries on such property.¹⁵ Neither could the

⁹ *Id.* at —, 93 P.2d at 108.

¹⁰ 268 Ky. 659, 105 S.W.2d 807 (1937).

¹¹ *Id.* at 664-65, 105 S.W.2d at 310. In a later case the court stated that to follow the argument advanced relative to municipal licensing of attorneys would exempt physicians, dentists, pharmacists, plumbers, barbers and members of many other professions from municipal control. *Newlin v. Stuart*, 273 Ky. 626, 117 S.W.2d 608 (1938).

¹² *Sterling v. Philadelphia*, 378 Pa. 538, 106 A.2d 793 (1954).

¹³ *New Jersey Interstate Bridge & Tunnel Comm'n v. Jersey City*, 93 N.J.Eq. 550, 118 Atl. 264 (1922); *Port of New York Authority v. Weehawken Township*, 27 N.J.Super. 328, 99 A.2d 377 (1953), *rev'd on other grounds*, 14 N.J. 570, 103 A.2d 603 (1954).

¹⁴ *Ptak v. Oklahoma City*, 204 Okla. 336, 229 P.2d 567 (1951).

¹⁵ *Monterey Oil Co. v. City of Seal Beach*, 120 Cal.App.2d 31, 41, 260 P.2d 851, 853 (1953). The court emphasized that it was “deciding only that the ordinance involved is void and unenforceable as to the state-owned submerged lands involved and we do not pass upon lands in upland areas of the City of Seal Beach over which the state does not have exclusive control.”

municipality under such circumstances apply its building regulations to an oil company relative to buildings being constructed in connection with drilling operations on state land.¹⁶

B. *State Building Commissions and Authorities*

The question arises whether the immunity of the state from municipal regulations applies in the case of a state building commission or authority. City zoning ordinances were held inapplicable to a state building commission even though the commission had no authority to create a state debt, having only the power to issue revenue bonds payable out of rents received, and could rent to private individuals as well as to the state. The commission still retained its public or governmental character and was within the "category of a State agency."¹⁷ A provision in the statute creating the commission that construction of buildings was to be "subject to such consent and approval of the city of Charleston in any case as may be necessary" was held not a "valid express grant of the State" that municipal police regulations were to apply.¹⁸ The New York Port Authority was also ruled to be an agency of the state and, in the absence of express statutory language conferring such power, not subject to municipal police regulations.¹⁹

C. *Leased Property*

The applicability of the principle of state immunity may arise in the case of leased property—private property leased to the state, or state property leased to a private individual. Is the applicability determined by the legal title or by the beneficial use? Where "business of any kind" was excluded from a district by a zoning ordinance, this was held to apply to a private building leased to the state for state offices. As stated by the Superior Court of New Jersey, "the immunity which a governmental agency may have from use prohibitions contained in a zoning ordinance does not extend to a private owner even though he

¹⁶ *Ibid.*

¹⁷ *City of Charleston v. Southeastern Constr. Co.*, 134 W.Va. 666, 64 S.E.2d 676 (1950). The question was whether the State Office Building Commission was subject to a municipal zoning ordinance.

¹⁸ *Port of New York Authority v. Weehawken Township*, 27 N.J.Super. 328, 99 A.2d 378 (1953), *rev'd on other grounds*, 14 N.J. 570, 103 A.2d 603 (1954).

¹⁹ *Ibid.*

leases the land to the governmental agency for such use.”²⁰ A Pennsylvania court, however, held that property leased to the state for use as a teachers college was not subject to a local zoning ordinance on the ground that the state was exercising a governmental function and was “not, therefore, subordinated to the zoning ordinance of the township.”²¹ The court indicated, however, that if the lease were limited to a short period of time, such as ten years, the property would be subject to local regulation.

What would be the result if the state leased state-owned property to an individual? The Attorney General of Illinois has taken the position that restrictions contained in city ordinances, including zoning ordinances, would be applicable to state lands while they were in the possession of a private person under lease, even though they would not be applicable to the state when it was in possession.²² This application of the doctrine of beneficial use rather than legal title would seem to be reasonable.

D. *State and State-Approved Institutions*

Sales to a state institution are generally immune from control by the city in which they are located. A city ordinance requiring the use of public scales in all sales of coal made within the city was held inapplicable to a person selling coal to a state institution.²³ As stated by the Missouri court, the institution and the city were “each under the control of the state” and “each is independent of the other, and we therefore can discover no reason, in the absence of statutory provision, supporting the city in interfering with the hospital in the purchases which the statute authorizes it to make.”²⁴ The court further concluded that “from the nature of things” there could be no superior authority over the state in the control or management of its property. In *Board of Councilmen of City of Frankfort v. Commonwealth*,²⁵ the pro-

²⁰ *Carroll v. Board of Adjustment of Jersey City*, 15 N.J.Super. 363, 83 A.2d 448 (1951).

²¹ *Harvard v. Haas*, 59 Pa. D. & C. 658, 58 Dauphin 316 (1947). See also *Baltimore v. Linthicum*, 170 Md. 245, 183 Atl. 531 (1936), where it was held that a city zoning ordinance was applicable to property leased to the United States for ten years for a substation post office. Cf. *United States v. Chester*, 144 F.2d 415 (3d Cir. 1944), and *Tim v. City of Long Branch*, 135 N.J.L. 549, 53 A.2d 164 (1947), where it was held that property leased by the United States under the Lanham Act was not subject to state and local police regulations.

²² 1952 Ill. Att’y Gen. Ops. 323.

²³ *City of Fulton v. Sims*, 127 Mo.App. 677, 106 S.W. 1094 (1908).

²⁴ *Id.* at —, 106 S.W. at 1095.

²⁵ 243 Ky. 633, 49 S.W.2d 548 (1932).

visions of an ordinance regulating the inspection and sale of milk were held not to apply to the delivery of milk under contract to a state institution located in the city on the ground that municipal regulations have "no application to state governmental functions controlled by a separate and distinct authority."²⁶ The Court of Appeals refused to distinguish the buildings or property of the state and the providing of services or supplies to a state institution.

Some courts have extended the state immunity principle to a state-approved private institution or organization. In New York, where state law provided that no hospital for the treatment of patients suffering from tuberculosis could be established in a town except when approved by the state commissioner of health, this officer granted approval upon the condition that the establishment of such a hospital in a town was not prohibited by a "*valid town ordinance*."²⁷ The court held that such an approved institution was not subject to a local zoning ordinance; the ordinance was invalid since it prohibited what the state law permitted, and in the exercise of this power a local government could defeat state policy on the establishment of such a hospital.²⁸ Municipal police regulations have been held not to apply to a state authorized and supervised farmer's market.²⁹ Dealers in fruits and produce in the Georgia State Farmers Market in Atlanta were not subject to regulation by the city since the state Commissioner of Agriculture had been authorized to make rules and regulations governing the conduct of such markets. The decision in this case may be explained and justified on the basis of legislative intent and of state occupation of the field. Likewise, on the basis of legislative intent, municipal speed regulations were held inapplicable to a private salvage corps organized under state law for the purpose of reducing fire losses.³⁰ Whether the legislature should take control over such state-approved private organizations from cities is questionable.

²⁶ *Id.* at 635, 49 S.W.2d at 550.

²⁷ *Jewish Consumptives' Relief Soc'y v. Town of Woodbury*, 230 App. Div. 228, —, 243 N.Y. Supp. 686, 689 (1930), *aff'd*, 256 N.Y. 619, 117 N.E. 165 (1931). (Emphasis added.)

²⁸ *Jewish Consumptives' Relief Soc'y v. Town of Woodbury*, 230 App. Div. 228, 243 N.Y. Supp. 686 (1930), *aff'd*, 256 N.Y. 619, 117 N.E. 165 (1931).

²⁹ *Newton v. Atlanta*, 189 Ga. 441, 6 S.E.2d 61 (1939).

³⁰ *State v. Sheppard*, 64 Minn. 287, 67 N.W. 62 (1896).

E. Waiver

The courts have strictly construed statutes waiving the immunity of the state from municipal police regulations.³¹ The rule stated in the *New Jersey Bridge* case and followed by most courts is that:

Statutes in derogation of sovereignty, such as those conferring powers on corporations, are to be strictly construed in favor of the state, and are not permitted to divest the state or its government of any of its prerogatives, rights or remedies, unless the intention of the legislature to effect such object is clearly expressed in the statute.³²

Even though the contract with a private contractor provided that "in all operations connected with the work the contractor shall strictly comply with all ordinances of Jersey City . . . which are applicable" it was held that the city was not a party to the contract, and it "cannot enforce its ordinances against this work by reason of any provision in the contract to which it is a stranger."³³ Other courts have upheld state immunity from local regulations "in the absence of over-riding legislation to the contrary,"³⁴ "a valid express grant of the State,"³⁵ "express statutory language,"³⁶ or unless it may be "clearly gathered" from the statutes of the state that it was the legislative intent to waive such immunity.³⁷

In some cases the courts have found sufficient statutory bases for waiver of the immunity of the state from local police regulations. Where a statute authorized cities to establish zones in which liquor stores might not be established, the Alabama Supreme Court ruled that a city might exclude a state liquor store from a residential district, and stated that "while we recognize that the operation of a liquor store is a governmental func-

³¹ *Jewish Consumptives' Relief Soc'y v. Town of Woodbury*, 230 App. Div. 228, 243 N.Y.S. 686 (1930), *aff'd* 256 N.Y. 619, 117 N.E. 165 (1931).

³² *New Jersey Interstate Bridge & Tunnel Comm'n v. Jersey City*, 93 N.J.Eq. 550, 118 Atl. 264 (1922).

³³ *Ibid.*

³⁴ *Carroll v. Board of Adjustment of Jersey City*, 15 N.J.Super. 363, 83 A.2d 448 (1951).

³⁵ *City of Charleston v. Southeastern Constr. Co.*, 134 W.Va. 666, 64 S.E.2d 676 (1950).

³⁶ *Port of New York Authority v. Weehawken Township*, 27 N.J.Super. 328, 99 A.2d 603 (1954).

³⁷ *Kentucky Institution for the Blind v. Louisville*, 123 Ky. 767, 97 S.W. 402 (1906).

tion, . . . this is no reason why the Legislature cannot provide that a liquor store may be included within a zoning ordinance."³⁸

F. *State Corporate Function*

If a state is engaged in the performance of a corporate rather than a governmental function does the principle of state immunity from local regulation apply? In determining whether municipal police regulations, such as zoning ordinances, apply to and bind the city itself, some courts base the decision on whether the city is acting in a governmental or corporate capacity. While the city may not be held to the height restrictions of a zoning ordinance in building a city hall, it may be held to such limitations in building a water storage tank for use in supplying water from a municipally owned plant.³⁹ This principle has not been extended to the state even though it is engaged in what would generally be considered a corporate function. An act of the Pennsylvania legislature incorporating a borough which provided that "it shall not be lawful for any person or persons" to sell intoxicating liquors within the limits of the borough has been held not to apply to property leased by the state for the purpose of establishing and operating a store for the sale of alcoholic beverages.⁴⁰ Furthermore, the Georgia court held that a state may not be enjoined from operating a state liquor store, even though the sale of liquor was prohibited under a state local option law. The state was not named in the statute and the court found no indication that the state intended to be bound by any local prohibition of the sale of liquor pursuant to the statute.⁴¹ Since the state by

³⁸ *Alabama Alcoholic Beverage Control Bd. v. Birmingham*, 253 Ala. 402, 44 So.2d 593 (1950).

³⁹ *Baltis v. Village of Westchester*, 3 Ill.2d 388, 121 N.E.2d 495 (1954); *Taber v. City of Benton Harbor*, 280 Mich. 522, 274 N.W. 324 (1937); *O'Brien v. Town of Greenburgh*, 239 App. Div. 555, 268 N.Y.S. 173 (1933), *aff'd*, 266 N.Y. 582, 195 N.E. 210 (1935); *McKinney v. City of High Point*, 237 N.C. 66, 74 S.E.2d 440 (1953). *Cf. Sunny Slope Water Co. v. Pasadena*, 1 Cal.2d 83, 33 P.2d 672 (1934); *C. J. Kubach Co. v. McGuire*, 199 Cal. 215, 248 Pac. 676 (1926), where the distinction was raised.

⁴⁰ *Baker v. Kirschnick*, 317 Pa. 225, 176 Atl. 489 (1935). In *Schippa v. West Virginia Liquor Control Comm'n*, 132 W.Va. 51, 53 S.E.2d 609 (1948), *cert. denied*, 337 U.S. 914 (1949), a state in the operation of a state liquor system was held to be engaged in a governmental function.

⁴¹ *Butler v. Merritt*, 113 Ga. 238, 38 S.E. 751 (1901). The Attorney General of Illinois has ruled that municipal building permit regulations were inapplicable to dormitories being erected at a state educational institution even though the bonds which were issued for their construction were to be liquidated from income received as rental from students occupying the dormitories and using the dining facilities of the kitchen. 1950 Ill. Att'y Gen. Ops. 153.

the sale of liquor is performing what might well be accepted as a corporate function, it may be argued that it is subject to local police regulations in the absence of a clearly stated statutory exemption.

G. *State Highways*

An area which has produced much state-local conflict is that of state highways within the corporate limits of cities. Cities have felt that by state acquiescence or policy, if not by law, they should have police control or regulatory power over city streets, even when they have been made a part of a state highway system and designated as state highways.

In view of the legal position of cities in our governmental system, they have only such control over their streets as has been conferred by the state, either by constitutional or statutory provisions. Thus the power to regulate speed on city streets is vested in the city only insofar as power has been granted by the state. In case of conflict between state and municipal regulation of speed in a constitutional home-rule state, the question arises as to whether this is a matter of local concern and subject to municipal regulation or of state-wide concern and subject to state regulation.⁴² And in a non-home-rule state, questions arise as to whether the power has been conferred by statute to make the regulation, whether the state has occupied the field, whether there is conflict between state and municipal regulations, and finally whether the regulation is reasonable.⁴³

There is a further question, and the one to which the present discussion is directed, as to whether general rules concerning the power of municipalities to control and regulate the use of their streets differs in the case of "state highways" within city limits.

⁴² *Ex parte Daniels*, 183 Cal. 636, 192 Pac. 442 (1920); *Winters v. Bisailon*, 152 Ore. 578, 54 P.2d 1169 (1936); *Everat v. Fischer*, 75 Ore. 316, 145 Pac. 33 (1914); *Kalich v. Knapp*, 73 Ore. 558, 142 Pac. 594 (1914); *Brand v. Multnomah County*, 38 Ore. 79, 60 Pac. 390 (1900), *rehearing*, 62 Pac. 209 (1900). The question of state occupation of the field and conflict between state and municipal regulations also arises in home-rule states. *Pipoly v. Benson*, 20 Cal.2d 366, 125 P.2d 482 (1942); *Schneiderman v. Sesanstein*, 121 Ohio St. 80, 167 N.E. 158 (1929); *Froelich v. Cleveland*, 99 Ohio St. 376, 124 N.E. 212 (1919).

⁴³ For cases strictly interpreting the scope of the power of cities over their streets under a statutory grant, see *Worthmore Marts, Inc. v. Town of Oyster Bay*, 116 N.Y.S.2d 725 (1952); *Chicago v. McKinley*, 344 Ill. 297, 176 N.E. 261 (1931); *Haggenjos v. Chicago*, 336 Ill. 573, 168 N.E. 661 (1929). On the occupation of the field theory, see *Chicago v. Willett Co.*, 1 Ill.2d 311, 115 N.E.2d 785 (1953).

It is the "state routes" passing through cities which have been the bone of contention, the sore spot, in city-state relations relative to control by cities over the use of their streets.

The power granted to cities over their streets may not be used to interfere with control by the state over its highways. The state may locate its highways in a city as it sees fit and, where needed, may take municipal land for the construction of an interchange even though the city objects.⁴⁴ State relocation and improvement of a highway in a city, over the city's objection, has been upheld in Ohio, a constitutional home-rule state, on the ground that it was a matter of state rather than of local concern.⁴⁵

An objection by a city to the plan or type of state highway construction, including the use of dirt fill rather than a steel or reinforced concrete structure, was unsuccessful in New Jersey. The city objected on the grounds that the proposed plan would "constitute an excessive taking of land which is valuable for future development as industrial sites." The court rejected "the idea that any and every municipality along the proposed turnpike could effectively veto either its location or the manner of its construction" as being in conflict with the entire concept of a state highway system.⁴⁶

State highway authorities under a statutory grant of power may select any route they desire in cities in the absence of a plain and palpable abuse of discretion. The New Jersey court refused to enjoin a proposed location on the grounds that "the State is sovereign and a municipality is a creature of the state."⁴⁷

In New Jersey and Ohio the question has arisen whether the state in constructing highways is subject to local zoning ordinances. The power of the State Highway Authority in New Jersey to approve the location of parkway service areas, including restaurants and gasoline service stations, in an area of a city

⁴⁴ *City of Elizabeth v. New Jersey Turnpike Authority*, 7 N.J.Super. 540, 72 A.2d 399 (1950); *State Highway Comm'n v. City of Elizabeth*, 102 N.J.Eq. 221, 140 Atl. 335 (1928), *aff'd*, 103 N.J.Eq. 376, 143 Atl. 916 (1928).

⁴⁵ *City of Lakewood v. Thornmyer*, 154 N.E.2d 662 (Ohio C.P. 1957); 154 N.E.2d 777 (Ohio C.P. 1958), *aff'd*, 157 N.E.2d 431 (Ohio C.P. 1959).

⁴⁶ *Newark v. New Jersey Turnpike Authority*, 12 N.J.Super. 523, 79 A.2d 897 (1951), *aff'd*, 7 N.J. 377, 81 A.2d 705 (1951).

⁴⁷ *City of Elizabeth v. New Jersey Turnpike Authority*, 7 N.J.Super. 540, 72 A.2d 399 (1950). See also *Weber v. Department of Public Works*, 360 Ill. 11, 195 N.E. 427 (1935); *Boyden v. Department of Public Works*, 349 Ill. 363, 182 N.E. 379 (1932); *Mowry v. Department of Public Works*, 345 Ill. 121, 177 N.E. 753 (1931).

where banned by zoning ordinances has been upheld. The court took the position that it was immaterial whether these matters (restaurant and service station) "cross the shadowy line between governmental and proprietary functions for, in either event, they constitute a proper public use."⁴⁸ And in Ohio it has also been held that a turnpike was not subject to control by municipal ordinance.⁴⁹

Since the power of the state over highways in cities is paramount, in many cases the question for the courts is one of constitutional or statutory interpretation. A constitutional provision, which reserved to cities "reasonable control of their streets," was interpreted by the Supreme Court of Michigan to mean that the city has "such control as cannot be said to be unreasonable *and inconsistent with regulations which have been established, or may be established, by the State with reference thereto.*" This construction allows a municipality to recognize local and peculiar conditions and to pass ordinances regulating traffic on its streets, *which do not contravene State laws.*"⁵⁰ As construed by the court, the constitutional grant is seriously limited. The court did go on to say that if state law took reasonable control from cities over its streets it would be unconstitutional and void.

When does the state take away the reasonable control by the city over its streets? On that question cities and the state have not agreed; and the courts have taken a liberal view as to the power of the state. Where the state prohibited parking on a state highway running through a city, and the abutting property owners and the city objected, the Supreme Court of Michigan held this did not interfere with the reasonable control by the city over its streets as granted by the constitution of the state. The court stated that when the state established a trunk line highway in the city it "thereby assumed an obligation to the people of the state in general to see to it that the street in question, together with the trunk line in general, is so maintained

⁴⁸ *Town of Bloomfield v. New Jersey Highway Authority*, 18 N.J. 237, 113 A.2d 658 (1955). The restaurant and filling station were to be operated by private corporations or individuals as a profit-making enterprise under lease from the Authority. Two justices dissented on the ground that these activities constituted a corporate function.

⁴⁹ *State ex rel. Ohio Turnpike Comm'n v. Allen*, 158 Ohio St. 168, 174, 107 N.E.2d 345, *cert. denied*, *Balduff v. Ohio Turnpike Comm'n*, 344 U.S. 865 (1952).

⁵⁰ *People v. McGraw*, 184 Mich. 233, —, 150 N.W. 836, 837 (1915). (Emphasis added.)

and controlled as to be reasonably available for the flow of traffic."⁵¹

A state trunk line in a city has been held "not a street in the sense used" in a constitutional provision providing that the legislature could not vacate or alter any street in any city or village. Widening a street for a state trunk line road running through the city was not a matter of local concern within a constitutional home-rule provision; neither did it violate the constitutional provision previously referred to granting to cities reasonable control of their streets.⁵²

The courts have in some cases called a halt to plans of a state highway department relative to a state trunk line running through a city. The Oregon Supreme Court held that the state could not shut off access to a state highway from intersecting streets by erecting curbs or other barriers. The court considered it beyond the statutory powers of the state highway commission to close streets in cities over which highways pass. "The legislature," the court stated, "has given the commission, in express terms, the means of controlling traffic and minimizing the hazards at dangerous intersections; it has not told the commission that it may abolish a part of such traffic."⁵³

H. *Municipal Control over Public Utilities*

What is the effect relative to the power of cities over public utilities which make use of their streets where a state commission has been given regulatory power over such utilities? On the principle of occupation of the field by the state, does it mean that the city has lost control over use of its streets by public utilities? Even though a public utility has a certificate of convenience and necessity granted by a state commission, may a city refuse permission to occupy its streets? And does the fact that the public utility is operating in a street which is a state route, and part of a state highway system, take from the city control over the right of such a utility to operate in its streets? These questions have proved to be another area of conflict between state and local authorities.

⁵¹ *Allen v. Ziegler*, 338 Mich. 407, 61 N.W.2d 625 (1953). Cf. *City of Dearborn v. Sugden & Sivier, Inc.*, 343 Mich. 257, 72 N.W.2d 185 (1955).

⁵² *Allen v. Rogers*, 246 Mich. 501, 224 N.W. 632 (1929).

⁵³ *Cabell v. City of Cottage Grove*, 170 Ore. 256, 130 P.2d 1013 (1942).

The right of a city to oust a public utility when its franchise expires even though it is under the jurisdiction of a state public utilities commission has been upheld by the Supreme Court of Missouri.⁵⁴ Even though the utility had a certificate of convenience and necessity from the state commission, it was also essential that it have a franchise from the city. This was held to apply to a street which was part of a state highway system.⁵⁵ Another court ruled that a city may require a license to operate a bus over streets which are a part of a state highway system.⁵⁶ And in Michigan, where the constitution grants to cities reasonable control of their streets, it has been held that a city may enact ordinances for the reasonable regulation of interurban motor busses provided such regulation does not affect the business outside the municipality, and if there is actual supervision incident to such regulation.⁵⁷

The Illinois Supreme Court earlier held that the act of the legislature giving the Illinois Commerce Commission jurisdiction over local transportation companies withdrew from cities the power to require a franchise.⁵⁸ On the same principle they could not require the removal of the poles of a utility when the franchise expired.⁵⁹ Later, however, the court stated that it was not following these two cases, and, on the basis of legislative intent, held that a city could oust a public utility from use of its streets when its franchise expired.⁶⁰ It has also upheld wheel and gross receipts taxes levied by cities on bus lines operating under a certificate of convenience and necessity issued by the state.⁶¹ This was based on the theory that the state had occupied only the regulatory field and this did not take from cities the right to use their power over streets for revenue purposes.

⁵⁴ *State v. Missouri Util. Co.*, 339 Mo. 385, 96 S.W.2d 607 (1936).

⁵⁵ *Ibid.*

⁵⁶ *City of Bridgeton v. Zellers*, 100 N.J.L. 33, 124 Atl. 520 (1924).

⁵⁷ The court held that the state had occupied the field by giving the state utilities commission jurisdiction over these utilities; but occupation of the field was subject to the constitutional provision giving cities reasonable control over their streets. It was held, however, that the license fee must be nominal and the fee of \$15.00 for each interurban bus was held to be excessive. *North Star Line, Inc. v. Grand Rapids*, 259 Mich. 654, 244 N.W. 192 (1932).

⁵⁸ *Chicago Motor Coach Co. v. Chicago*, 337 Ill. 200, 169 N.E. 22 (1929).

⁵⁹ *City of Geneseo v. Illinois No. Util. Co.*, 363 Ill. 89, 1 N.E.2d 392 (1936).

⁶⁰ *City of Geneseo v. Illinois No. Util. Co.*, 378 Ill. 506, 39 N.E.2d 26 (1941).

⁶¹ *Peoria v. Peoria Transit Lines*, 11 Ill.2d 609 (1957); *Chicago v. Hastings Express Co.*, 369 Ill. 610, 17 N.E.2d 576 (1938).

II. THE PRACTICE IN THE APPLICATION OF MUNICIPAL POLICE REGULATIONS TO STATE PROPERTY

Out of the judicial decisions there has developed a body of law relative to the application of municipal police regulations to the state. As is frequently the case, the practice in some cities varies from the law as laid down by the courts. On the basis of correspondence with city attorneys in cities where state capitols, state universities and other state educational institutions, state penal and welfare institutions, and other types of state property are located, some consideration will now be given to the practice as reported by these officials.⁶²

A majority of the cities reporting stated that they did not apply their "zoning, building inspection, building permit, smoke control, elevator or boiler inspection, or other police regulations to buildings owned by the state." Some do this by practice, merely making no attempt to enforce these regulations against the state; others specifically grant an exemption in their regulatory ordinances to state property.

A small number of the cities reported, without explanation or comment, that they did apply their police regulations to the state. Several stated they could apply their regulations only because the state did not stand on its legal immunity. Practically all stated that any fee involved (as a building permit fee) was waived. A Wisconsin city, illustrative of this group, stated that it applies its "zoning, building inspection, building permit, elevator and boiler inspection requirements to buildings owned by the state, with the exception that a provision is made in the Code of Ordinances for a 'no fee permit,' which specifically exempts the state, in addition to other political subdivisions, from the payment 'of any fee for permits' authorizing the construction of any building, structure, equipment, additions, and alterations."⁶³

Other cities reported they did not attempt to apply their police regulations to the state but that in fact the state did comply. Illustrative of this group is an Illinois city which reported that no present effort was being made to enforce its zoning ordinance against state or federal property. The city found that both the

⁶² The discussion which follows is based on replies received from the city attorneys of one hundred sixty-three cities.

⁶³ *Cf. Milwaukee v. McGregor*, 140 Wis. 35, 121 N.W. 642 (1909).

state and federal authorities comply with zoning and other police regulations if brought to their attention. An Arizona city, after stating that it did not apply its police regulations to buildings owned by the State, went on to say: "As the State appreciates some of these services, such as building inspection, it has been customary for it to take out a building permit for which we charge no fee and then with the consent of the State our inspectors check the construction of buildings. This is also true as to boiler inspection." And an Oregon city reports: "We do not directly apply any police regulations to state-owned property; however, the state generally cooperates with the city to the extent that they automatically comply without any pressure being brought." Other cities report that "as a practical matter, the state does follow our regulations carefully" (New Mexico); "in all instances governmental agencies are the ones which desire to comply with local ordinances" (Illinois); and "we have a fairly good working arrangement with the University and have experienced little or no difficulty" (West Virginia).

Some cities report they distinguish between applying their regulations to the state and to a contractor engaged in constructing a building for the state. A Minnesota city reports that:

For example, where State construction is going on within the city, ordinarily this work is carried on by an independent contractor acting as an agent of the State. We are, under District Court decisions, allowed to make charges against the contractor for license fees, inspection fees, etc. This, of course, is with the acquiescence of the State, since the Legislature could afford these independent contractors the immunity of the State from such controls and regulations should it desire to do so.

A similar practice is reported by a city attorney in Tennessee:

The question of making a charge for building permit fees and smoke control and abatement has arisen. It is my understanding that these fees cannot be assessed against the State when the liability therefore resolves itself to the question of being collected from the property owned but, if the state contracts for this work with private and independent contractors they are made responsible for the payment of these fees.

And a Texas city reports that contractors constructing state buildings have been paying local permit fees but the city attorney

adds: "I doubt that we could force the collection of such fees if the contractor refused to pay them." A California city also reports that in the case of building permits, they "usually waive the fee if the work is done by a government. If the work is done by a private contractor, we charge the contractor the usual fee."

As pointed out earlier, the argument has been advanced that the immunity of the state from municipal police regulations should not apply when the state engages in corporate or proprietary functions. One corporation counsel reported his city applied this principle in practice: "The city has adopted the principle that zoning and other regulatory ordinances do not apply to the state or federal governments. However, in some instances, we have attempted to distinguish between what is purely a governmental function and that which is purely proprietary and have usually insisted upon compliance with our local ordinances when the governmental agency acts in a so-called proprietary capacity."

In some cases the state apparently cooperates with cities in applying municipal police regulations but on the state's terms. A Pennsylvania borough in which a state teachers college is located reports its experience:

We are unable to apply any such ordinances (police regulations) to the state property. Intermittently for years by negotiation, an attempt has been made to abate a smoke nuisance created by the college heating plant. After some years, a new chimney was built by the college to solve the problem by making combustion more complete. The proposed solution failed and the issue is now dead, 'the college having done all it can to help the situation.'

An Illinois city, in which several types of state property are located, reports:

Although the local authorities in the respective institutions are generally quite co-operative, they each have limited powers and for that reason often times confusion exists wherein some higher-up in the state organization orders such and such to be done without having checked to see how it fits with the city plan or whether it is in violation of some specific ordinance.

And a North Dakota city reported that "at this moment the University is moving onto its property some quonset buildings

for faculty housing, which do not conform to our building code, but the University asked for and received permission to put these sub-standard buildings on some off-campus property." This city reported it never attempted to apply its police regulations to buildings owned by the state.

The unsettled state of the law as to the power of cities to apply their police regulations is revealed in the replies received from several city attorneys. A Washington city states that "there is some question whether zoning, building, etc. ordinances are applicable to state owned buildings operated by the state in its governmental capacity,"⁶⁴ and a city in New York reports that "as a practical matter, zoning restrictions and building requirements are generally observed, although, it is probable that the State, as a superior sovereignty, is not subject to control by local regulation." A Colorado city replies the law is unsettled in that state, and states that "assuming the question raised in your letter arises under this new ordinance [a zoning ordinance], it is our present thinking that we shall advise our zoning department to take the position that the zoning ordinance does not apply to state-owned buildings. This position is based upon what we think is a recent trend justifying the position." A Missouri city does not agree with this position as to the modern trend, saying: "The state refuses to permit us to apply this type of regulation [zoning, building inspecting and other police regulations] against their property. It is the opinion of our office [city attorney] that this field should be exclusively for the city. However, the Attorney General of the State does not allow us to enforce these regulations against state property. We feel the opinion he has rendered in this connection does not reflect the modern trend in the law."

Several other cities report this same situation—the law is unsettled and conflict exists between the cities and the state.⁶⁵

Reports from many cities indicate they are not satisfied with

⁶⁴ Another city attorney in Washington states: "Through the attorney general's opinion with which most attorneys do not agree though none of us have taken it to court, the State is not required to take out a building permit or to comply with local building regulations though in most cases it does."

⁶⁵ A California city attorney reports: "There is a conflict between the views of the State authorities and myself with respect to the application of the City's ordinance pertaining to the building code and particularly the portions thereof requiring inspection permits, paying a fee, etc. I take the position that the State is obligated to comply with such ordinances. The State authorities take a contrary view."

the principle of immunity of the state from municipal police regulations. The view of this group of cities was forcefully stated by a city attorney in California as follows:

There are many instances which arise causing much dissatisfaction because the City is not permitted to impose police regulations to state property. Examples: School buildings are designed by the State architect, and many times do not come near to complying with our own building code, plumbing and electrical codes. Another example is the State Armory. The State refused to meet our plumbing code requirements, even though it had been informally agreed that the State would comply with all city regulations, particularly in view of the fact that the City had given the site for the Armory. There are many other like situations arising where the state will refuse to comply with local regulations, causing citizens in like circumstances to put up quite an argument why they should be compelled to meet the regulations if the state should not see fit to do so.

Apparently this sentiment is shared by other cities. An Iowa city states there has been "dissatisfaction with the lack of regulation of the University in regard to erecting buildings contrary to our zoning ordinance"; and a Texas city reports there is a dispute between the city and the state as to whether "zoning, building inspection, and building permit regulations" apply to a state-owned junior college and that "actually the matter is rather unsettled at this time."

Some cities report that by cooperation with state authorities they have been able to obtain compliance with local regulations in many cases and, in this way have in practice modified the immunity of the state doctrine. In some cases this has been formalized by a joint committee representing the city and the state institution. An Iowa city which reported that there was dissatisfaction because the state did not comply with municipal zoning and other police regulations stated that "many of the difficulties and friction between the city and University are being gradually ironed out by the formation of a committee to coordinate some of the activities." Cooperation and voluntary compliance with local police regulations by state agencies seems to have provided a satisfactory and workable solution to the problem in many communities.

Another solution would be for the state by legislative act to waive its immunity from local police regulations. Statutes which have been enacted in Oregon and North Carolina have applied this principle. The zoning enabling act which was passed in North Carolina in 1923 was amended in 1959 to provide that "all provisions of this Article are hereby made applicable to the *erection and construction of buildings by the State of North Carolina* and its political subdivisions."⁶⁶ The Oregon zoning statute authorizes the city council "by ordinance to regulate, restrict and segregate the location of industries, the several classes of business, trades or callings, the location of apartment or tenement houses, clubhouses, group residences, two family dwellings, single family dwellings *and the several classes of public and semipublic buildings*."⁶⁷

Cities might find they were more effective if they shifted their efforts from the courts to the state legislatures. In many states, municipal leagues have become powerful organizations in the legislative process. Acting through such organizations, cities might be successful in making some inroads on the doctrine of state immunity from local police regulations.

⁶⁶ N.C. Pub. Laws 1923, ch. 250, as amended N.C. Pub. Laws 1959, ch. 1203. (Emphasis added.)

⁶⁷ Ore. Rev. Stat. § 227.230 (1953). (Emphasis added.)

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